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| Vasquez v Loli Cars, Inc. |
| 2022 NY Slip Op 32240(U) |
| January 12, 2022 |
| Supreme Court, Bronx County |
| Docket Number: Index No. 25034/2018E |
| Judge: Veronica G. Hummel |
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To commence the statutory time for appeals as of right (CPLR 5513[a]), you are advised to serve a copy of this order, with notice of entry, upon all parties.

**SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF BRONX IAS PART 31**

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VENECIA VASQUEZ,

Plaintiff,

-against -

**Index No. 25034/2018E
DECISION/ORDER
Motion Seq. 2**

LOLI CARS, INC. and "JOHN DOE",
Defendant.

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VERONICA G. HUMMEL, A.S.C.J.

In accordance with CPLR 2219 (a), the decision herein is made upon consideration of all papers filed by the parties in NYSCEF in support of and in opposition to the motion of defendant LOLI CARS, INC. [Mot. Seq. 2] (defendant), made pursuant to CPLR 3212, for an order dismissing the complaint on the ground that plaintiff VENECIA VASQUEZ (plaintiff) has not sustained a "serious injury" as defined by Insurance Law 5102(d).

This is a negligence action to recover damages for personal injuries that plaintiff allegedly sustained as a result of a motor vehicle accident that occurred on March 24, 2017, at approximately 11:00 a.m. on southbound Bailey Avenue, at or near the intersection with 234th Street, Bronx County, N.Y. (the Accident).

In the bill of particulars, in relevant part, plaintiff alleges that, as the result of the Accident, plaintiff suffered injuries, and those injuries fall within the serious injury categories of: permanent loss of use; permanent consequential limitation; significant limitation; and 90/180 days. As plaintiff fails to address the ground of permanent loss of use on this motion, however, that ground is deemed waived (*Burns v Kroening*, 164 AD3d 1640 [4th Dept 2018]).

In any event, as plaintiff does not allege a total loss of a body part, the claim is dismissed (*Oberly v Bangs Ambulance, Inc.*, 96 NY2d 29 [2001]).

Defendant seeks summary judgment dismissing the complaint on the ground that plaintiff did not sustain a “serious injury” under Insurance Law 5102(d). Defendant argues that plaintiff’s claimed injuries are not “serious,” and that any injuries or conditions from which plaintiff suffers are not causally related to the Accident. The underlying motions are supported by the pleadings, the bill of particulars, plaintiff’s deposition transcript, and the expert affirmations of Dr. Springer (radiology) and Dr. Buckner (orthopedic).

In his report in support of defendant’s motion, Dr. Springer reviews the May 2017 (approximately one month post-Accident) MRIs of plaintiff’s cervical spine and lumbar spine and the MRI of plaintiff’s left knee (performed 11/2017, approximately eight months post-Accident).

As for the cervical spine, the radiologist finds multiple disc bulges and herniations that are caused by degenerative disc disease with no traumatic basis and no post-traumatic changes causally related to the Accident. He opines that the findings are caused by degenerative disease, and that the conditions could not have developed in the time period between the Accident and the MRI. He makes similar findings concerning the bulges demonstrated in the lumbar MRI, finding that the cause is degenerative disease, there is no evidence of trauma, and that the conditions could not have developed in the time period between the Accident and the MRI.

In terms of the left knee, the doctor does not find any fracture. There is moderate chondromalacia in the joints, bone cysts, degenerative changes and narrowing. The physician finds a chronic tear throughout the lateral meniscus and mucoid degenerative changes. He opines that there are no posttraumatic changes causally related to the Accident.

Dr. Buckner bases his opinion on the details of a physical examination conducted on plaintiff on December 9, 2019 (two and one-half years post-Accident). The doctor states that he reviewed the bill of particulars and the police report. Dr. Buckner conducted objective tests on the cervical spine, lumbar spine, and “lower extremities,” finding negative results. The doctor cites ranges of motion, but offers no comparisons. Instead the expert refers to treatises that state, in sum and substance, that range in motion is no longer used as a basis for defining impairment.

The doctor finds no objective evidence of a serious injury to the cervical spine, the lumbar spine or the knee. He opines that there is arthritis in the bilateral knees and the patient is a class 1 in terms of obesity. The expert states that plaintiff did not sustain any serious injury as a result of the Accident. There is no causally-related injury or disability.

Finally, in terms of the 90/180 day category, plaintiff testified that she missed a total of four hours of work as the result of the Accident and was never confined to home

Based on the submissions, defendant sets forth a *prima facie* showing that plaintiff did not suffer a serious injury to the relevant body parts under the permanent consequential limitation, significant limitation, or 90/180 day categories (*Stovall v N.Y.C. Transit Auth.*, 181 AD3d 486 [1st Dept 2020]; see *Olivare v Tomlin*, 187 AD3d 642 [1st Dept 2020]).

Plaintiff opposes the motion, submitting an attorney affirmation, plaintiff’s affidavit, plaintiff’s deposition transcript, the affirmation and reports of Dr. Nochimson (pain management), Dr. Mayerfield (radiologist-spine MRIs), Dr. Decker (radiologist-left knee MRI), and plaintiff’s medical records. Defendant did not submit a reply on this motion.

In total, plaintiff’s evidence raises triable issues of fact as to plaintiff’s claims of “serious injury” under permanent consequential limitation and significant limitation categories as to the lumbar spine and cervical spine only, (*Morales v Cabral*, 177 AD3d 556 [1st Dept 2019]).

Plaintiff's submissions demonstrate that plaintiff received medical treatment for the claimed spinal injuries immediately after the Accident, and that plaintiff had substantial limitations in motion in the relevant body parts after the Accident. At the recent examination by plaintiff's expert in 2020, the expert found significant limitations as to the lumbar spine and cervical spine (see *Perl v Meher*, 18 NY3d 208 [2011]). Plaintiff's expert finds that, as a result of the Accident, plaintiff suffered herniations and bulges to the cervical and lumbar spines, confirmed by the MRIs. The expert finds past and future restrictions as to the lumbar spine and cervical spine and opine that these injuries: are significant and causally related to the Accident; permanent in nature; the Accident was the sole competent cause of the injuries; and the injuries are not the result of any prior condition (*Morales v Cabral, supra; see Aquino v Alvarez*, 162 AD3d 451, 452 [1st Dept 2018]). The records submitted concerning course of treatment indicate persistent significant limitations in the lumbar spine and cervical spine, which the physician casually related to the Accident and to objective MRI evidence, thus raising an issue of fact as to whether plaintiff sustained a significant limitation of the use of those body parts (*Licari v Elliott*, 57 NY2d 230 [1982]; see *Lee v Lippman*, 136 AD3d 411 [1st Dept 2016]).

In contrast, in terms of the left knee, the evidence does not: show contemporaneous complaints of knee pain; set forth significant restrictions range of motion; or include a recent examination capable of proving permanency (see *Wong v Cruz*, 140 AD3d 860 [2d Dept 2016]) and therefore plaintiff fails to raise an issue as to a permanent consequential limitation or significant limitation to the knee (see *Lee v Lippman*, 136 AD3d 411 [1st Dept 2016]). Of course, if a jury determines that plaintiff has met the threshold for serious injury, it may award damages for any injuries causally related to the accident, including those that do not meet the threshold (*Morales v Cabral, supra; Rubin v SMS Taxi Corp.*, 71 AD3d 548 [1st Dept 2010]).

In contrast, defendants established *prima facie* that there was no 90/180 day injury by submitting plaintiff's own testimony that she missed only hours of work, and plaintiff's submissions fail to raise an issue of fact (*Morales v Cabral, supra*).

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The court has considered the additional contentions of the parties not specifically addressed herein. To the extent any relief requested by either party was not addressed by the court, it is hereby denied. Accordingly, it is hereby

ORDERED that the motion of defendant LOLI CARS, INC. [Mot. Seq. 2] (defendant), made pursuant to CPLR 3212, for an order dismissing the complaint on the ground that plaintiff VENECIA VASQUEZ (plaintiff) has not sustained a “serious injury” as defined by Insurance Law 5102(d) is denied.

The foregoing constitutes the decision and order of the court.

Dated: January 12 2022

E N T E R,

s/Hon. Veronica G. Hummel/signed 01/12/2022
Hon. Veronica G. Hummel, A.J.S.C.

